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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL.,

Appellants,

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,

Appellees.

Motion For Leave To File Brief Amicus Curiae and

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF LAYMEN

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January 15, 1971

PANTAGRAPH CO.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF FOR NATIONAL ASSOCIATION OF LAYMEN AS AMICUS CURIAE

To: The Supreme Court of the United States

The National Association of Laymen respectfully moves for an order granting leave to file a brief amicus curiae in the above entitled case pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Consent of the attorney for the appellants as well as attorneys for appellees, Kurtzman and Sloan has been filed. Consent of the attorneys for appellee schools has been requested over [ninety] days ago and no notice of refusal of permission has been received.

1. The National Association of Laymen (NAL) was founded in 1957 and is composed of 29 affiliates and 12,000 members. NAL is incorporated under the Texas Non-profit

Corporation Act and is organized exclusively for religious and charitable purposes. This association is both independent in formation and operation and while its membership is composed principally of lay Catholic men and women, it remains unencumbered by either legal or ecclesiastical affiliation with the Catholic Church. This association was conceived from the implementing concepts of Vatican Council II and is dedicated to renewal of the Roman Catholic Church. NAL has spearheaded the movements to obtain greater lay involvement in the significant decisions concerning priorities for church action and the expenditure of human and financial resources. Of significant importance is that NAL has challenged the traditional Catholic approach to education.

It is our position that the interest of NAL in this litigation is unique and not represented by any of the parties. NAL represents the voice of the progressive Catholic laity striving for the establishment of educational priorities within the Catholic Church. Moreover, the decision of the Court in this case involves matters that affect far more people than the immediate record indicates, and is expected to have a grave effect upon our members and ideological supporters in the Commonwealth of Pennsylvania as well as a potentially serious impact upon progressive Catholics throughout the nation.

2. The involvement of NAL in this matter is necessary and vital so as to prevent the circumvention of the Constitution of the United States. The position of NAL is set out in two arguments, the former is concerned with the purpose and primary effect of Act 109 as it effects the establishment clause of the first amendment. The latter will involve the public welfare purpose of Act 109 as it affects the constitutional guarantee of religious freedom.

With respect to the establishment clause, NAL will advise the Court regarding a very real conflict which is precipitated by Act 109 as it is considered in its relationship with ecclesastical law which claims preeminence over the former. This brief will bring to the Court's attention the impossibility of performance of Act 109, this purchase of service contract, because of its direct conflict with ecclesiastical law. Moreover, NAL will

request this Court to consider the aggravating divisiveness encountered when government attempts to become excessively involved in religion thereby creating an educational interdependence between the state and religion.

The brief of NAL will also advise the Court regarding the adverse effects upon religious freedom which results from an effort of the Commonwealth of Pennsylvania to aid in perpetuating the existing Catholic school system against the interests and wishes of a considerable segment of members of the Catholic church. NAL will bring to the attention of the Court the apparent absence of a compelling reason for this public welfare legislation because of the existence of palliative alternatives, including use of existing church funds.

3. NAL will advise the Court of unique information within the knowledge of this association. This brief will point out matters of pertinent information relating to church government and laws, customs, ideologies, educational philosophies, as well as information relating to financial consideration. Because of the special knowledge of Catholic church matters, NAL urges that it can provide the Court with relevant and meaningful information necessary to a proper and complete judgment of this case.

For the foregoing reasons, NAL through its attorney, respectfully prays that he be accorded leave to file a brief amicus curiae in order to present arguments and viewpoints on the matters involved in the case, which the parties themselves may not present.

Dated January 15, 1971

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SUMMARY OF ARGUMENT

I

It appears virtually certain that the primary purpose and

principal effect of The Pennsylvania Elementary and Secondary Education Act (Act 109 of 1968) is to offer significant direct financial aid to Catholic parochial schools. Such enactment provides only an extrinsic and indirect benefit to the welfare of the public. It is incongruous not to accept this inescapable conclusion because the pattern of state aid to nonpublic school legislative efforts can be traced directly to the hierarchy of the Roman Catholic church operating through the United States Catholic Conference. The background and legislative history of Vatican II documents vividly sustains this premise.

If the primary purpose of Act 109 is to offer direct financial aid to private schools operating under the control of religious bodies, then we must determine whether this act either on its face or in its primary effect advances or inhibits religion. Our research has convinced us that Canon Law, supported by the teaching body of the Church (the hierarchy), unmistakably requires that the imparting of religious and moral principles must permeate the entire curriculum of the Catholic school. The Declaration on Christian Education, a promulgation of Vatican II, refutes the concepts of a separatist approach to Catholic education, a concept necessary to the validity of Act 109.

Pennsylvania Act 109 limits the implementation of the law solely to defined "secular subjects." The term is defined to "mean any course which is presented in . . . public schools . . . and shall not include any subject matter expressing religious teaching, or the morals . . . of any sect." If the laws of the Catholic church require a permeated curriculum and prohibit a separatist educational system, and the law of the Commonwealth can aid only a separatist system, the purpose and primary effect of Act 109 is frustrated. We submit that this apparent dichotomy can be resolved only after an evidentiary hearing on the merits of the case.

The Court, in *Abington Township v. Schempp* 374 U.S. 203 (1963) expressed the doctrine that one of the most important determinations of governmental-religious associations is whether the enacted law will give rise to "divisive influences and inhibitions of freedom which both religion clauses of the

First Amendment preclude." Experience in Illinois and in other jurisdictions wherein state-aid provisions were considered manifests a divisive and harmful situation when such aid is under legislative consideration. Mr. Justice Harlan, in *Board of Education v. Allen*, 392 U.S. 236 (1968) forewarned us of the dangers involved when the state becomes so significantly involved in religious matters. We urge the Court to consider the very real possibility that permanent wounds might well result from this continued activity.

II

The Pennsylvania Elementary and Secondary Education Act (Act 109 of 1968) is a law which prohibits the free exercise of religion. Appellees brief (at 54) expresses that this Act does not, "place any restriction upon anyone's religion." The National Association of Laymen is composed of many thousands of Catholic laity who are decidedly committed to the renewal of the Catholic church. Moreover, many thousands of Catholic citizens who are not members of this association share in its goal for church renewal. A fundamental belief of these progressive Catholics is that the Catholic educational system must be used to pursue the goal of renewal: to bring salvation to all men.

NAL, and its ideological supporters, are demanding that the church establish priorities for the use of church educational resources. The present, parochial school system which uses a substantial amount of those resources for the *general* and *religious* education of but a small percentage of total church population, to the exclusion of a religious education of all, manifests, in our judgment, a misdirection of priorities.

The alleged public welfare purpose of Act 109 infringes upon the free exercise right of thousands of Catholics. Moreover, no compelling reason justifies the substantial infringement upon the free exercise rights of progressive minded Catholics. The Court has held that it would not tolerate governmental interference nor excessive entanglement with religion, *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970). The Commonwealth of Pennsylvania has indeed

interfered with the religious beliefs of progressive minded Catholics who are seeking renewal of their church through the enactment of Act 109. The Commonwealth should not be permitted to legislate measures designed to perpetuate the parochial school system in order to reduce its overall educational funding responsibilities; particularly so, if such enactment violates the religious freedom of a large number of American citizens.

If the Commonwealth finds that the public welfare must be served by providing direct financial aid to Catholic schools, it must further establish that no other measures are available to accomplish its purpose. The Commonwealth has not established that any other means, other than direct financial aid, have been attempted in an effort to meet its "public welfare" obligation. Finally, in establishing a compelling need, the Commonwealth has not determined whether church funds are available to provide for the "secular" education of Catholic school students in parochial schools.

ARGUMENT

I

THE COURT BELOW ERRED IN DECLARING THAT PENNSYLVANIA ACT 109 DOES NOT ON ITS FACE OR PRIMARY EFFECT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT WITHOUT BENEFIT OF DISCOVERY, EVIDENCE OR TRIAL.

Upon the basis of current Catholic Church laws, theology and customs, it appears certain that the primary purpose as well as the principal effect of Act 109 is to offer significant aid to Catholic, parochial schools, and thus violates the Establishment Clause of the First Amendment, as made applicable to the states by the Fourteenth Amendment. *Abington School District v. Schempp*, 374 U.S. 203 (1963).

The question of law presented in the lower court is whether the purpose or the primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion. *Lemon v. Kurtzman*, 310 F. Supp. 35, 43.

There appears to be little question but that Lemon is but the next step in a pattern following *Board of Education v. Allen* 392 U.S. 236 (1968) in an attempt to obtain direct, substantial aid to parochial schools. In *Allen*, the Court reexamined its earlier decisions and expressed that the test of constitutionality first adopted in *Abington School District v. Schempp*, 374 U.S. 203 (1963), would be the appropriate test to determine the validity of legislation designed to achieve a public purpose through religiously affiliated institutions. 392 U.S. 236, 243.

> That test is stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment clause there must be a secular legislative purpose and a primary effect that neither advances or inhibits religion." *Schempp*, supra at 222. See also *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968).

It appears incongruous to accept the majority determination that the purpose and effect of Act 109 as manifested in 24 P.S.§5602 forecloses further investigation and discussion. We find it ponderously difficult to escape the immediate conclusion that the primary purpose of the act is to offer financial aid to sectarian Catholic schools. Whatever furtherance of the public welfare is involved, can only be termed as parenthetical and extrinsic. If evidence were offered, it would tend to establish that the introduction of legislation to obtain aid to Catholic schools in the various state legislatures has been precipitated, in large measure, by the actions of the American bishops operating through the United States Catholic Conference. The virtual impossibility of obtaining information regarding covert church activities renders it difficult to trace the origination of this movement in the United States; nevertheless, we cannot validly ignore its existence.

The Declaration on Christian Education of Vatican Council II, proclaimed by Pope Paul VI, on October 28, 1965, is the most recent official Church word on this subject. A Commen-

tary by Rt. Rev. Mark J. Hurley, a council expert serving the Commission on Education, (bearing the Imprimatur of Joseph T. McGucken, S.T.D. Archbishop of San Francisco), provides meaningful legislative history surrounding the promulgation of this document.[1] Cardinal Patrick A. O'Boyle, Archbishop of Washington, in a Foreword to this Commentary notes that Rev. Hurley was active in the deliberations of the Commission and its works. Cardinal O'Boyle reports, "He (Hurley) writes from the 'inside' authoritatively." [2]

In his Commentary, Rev. Hurley expresses the intent of the American bishops to have the document on education reflect their intense interest in financial aid.[3]

> The American members on the Conciliar Commission on Education were Archbishop Patrick O'Boyle of Washington, D.C., Archbishop [now Cardinal] John Cody of Chicago . . . and [former] Bishop Loras Lane of Rockford, Illinois. Their voices were heard to express the American point of view chiefly in three major areas:
>
> 1. The Council must make a statement that will be the basis for a coherent philosophy of Catholic education, one that will help to clarify church-state relationships in the field. Freedom of choice by parents to select the schools they want for their children; moral and financial assistance to parents on a non-discriminatory basis; a repudiation of monopoly in education by the state—these were details to be worked out by the Council.
>
> 2. The Catholic Church must promote both the Catholic schools as such and the other forms of education of those not in Catholic schools.
>
> 3. The Commission must make every effort to present a document at once consonant with papal teaching, especially that of Piux XI "On the Christian Education of Youth of 1929", and also to update that document and

[1] Hurley, M. *Commentary on Declaration on Christian Education of Vatican Council II*, Paulist Press, (1966).

[2] Supra, at 9.

[3] Supra, Note 1 at 22, 23.

make some significant advance beyond it with sound theory.

Following this listing of objectives quoted above, Rev. Hurley added, "Thus the American problematic was chiefly practical, but yet not entirely so. Practical conclusions needed to be drawn from sound theoretical bases, particularly if tests of constitutionality were to hold up in court." [4]

The influencing force of the American bishops upon the Vatican Council was manifested by formal Interventions designed to act as an influencing force upon the final document. The intervening statement of Cardinal Spellman illustrates the bishops' intent.[5]

> Parents should be free to choose the schools they wish for their children. They should not in consequence of their choice be subject to unjust economic burdens which would infringe upon this freedom of choice. Since it is the function of the state to facilitate civil freedom, justice and equity demand that a due measure of public aid be available to parents in support of the schools they select for their children.

Cardinal Spellman [at that time the unquestioned leader of the Church in America] continued with a clear reference to the United States: "Moreover, if these schools serve the public purpose of popular education, *the fact that they may be religious in their orientation should not exclude them from a rightful measure of public support.*" (Emphasis ours)

It is difficult to escape the conclusion that the genesis of the current drive to obtain state-aid to Catholic schools arose during the deliberations of Vatican II. It also appears certain that the overwhelming interest of the American bishops was to obtain governmental assistance to further the aims of Catholic educational goals. The forum under which this effort would be directed as provided by Rev. Hurley: ". . . [E]ach national conference of bishops . . . should be empowered by the Coun-

[4] Ibid., at 23.

[5] Supra, Note 1, at 152.

cil to make specific application of the schema on education to their own countries and specific conditions." [6]

The movement in the past several years to seek financial aid from the various state legislatures appears as a direct manifestation of the hierarchical plan of action commenced during Vatican II. Further evidence of application of this movement is expressed in the following summary: [7]

> Although they met with several setbacks, Roman Catholics this year gained favorable action in nearly a dozen states in their drive for direct public aid to parochial schools . . . A recent survey by the *U.S. Catholic Conference* showed these other gains by the church drive.... (Emphasis ours)

Based upon the available evidence, outlined above, we cannot escape the conclusion that the introduction of legislative history and relevant testimony would adequately support the conclusion that the primary purpose and effect of this act is to supply financial need to Catholic schools. Understandably, legislative findings are not lightly set aside; nevertheless, the overriding effect of the carefully drawn plans of the American hierarchy cannot be justly disregarded.

If indeed it is established by a supportive record that the primary purpose and effect of Act 109 is to offer financial aid to parochial schools, we must now determine whether evidence is available to establish whether or not such aid meets the test set out more recently in *Allen*: Does Act 109 either on its face or in its primary effect advance or inhibit religion?

Based upon knowledge of Catholic Church policies and customs, NAL can accept the holding of *Everson v. Board of Education*, 330 U.S. 1 (1947), that the public welfare is adequately satisfied by legislating measures to protect parochial school children to and from school wherein religious instruction is provided. But, in addition to the public interest, it appears as if little benefit inures to the religious institution. From our knowledge, parochial schools seldom provide transportation to their

[6] Supra, Note 1, at 24.

[7] Bay City Times, Aug. 25, 1970.

pupils. Parents are left to their own devices and would be expected to furnish their own means of conveyance. The primary beneficiary is the child, not the school.

On the other hand, *Board of Education v. Allen*, 392 U.S. 236 (1968), in providing for the loan of textbooks without charge gives us more difficulty interpreting the rationale. We must first of all understand that *Allen* was decided upon the basis of a "meager record" (392 U.S. 236, 248); and this is unfortunate. A full evidentiary hearing might well have produced a different result. Nevertheless, from our knowledge, evidence is available to establish that the rule and customs inherent in New York parochial schools would follow that of other areas. Traditionally, in Catholic schools, textbooks, as well as transportation, remain the responsibility of the parents. The practice of lending books to students provides little, if any, financial aid to sectarian schools. Again, the principal benefit of the New York statute inures to the child, not the school; therefore the result of *Allen* is not strikingly dissimilar to *Everson*.

We recognize that the public welfare or public interest holdings of *Everson* and *Allen*, were predicated upon the doctrine that the Constitution does not prevent a state from offering assistance to religious institutions simply because some direct aid inures to the institution. But these cases in support of that doctrine do not extend as far as paying funds into the Treasury of religious institutions simply because it is of a benefit of the state to do so. *Lemon v. Kurtzman*, 310 F. Supp. at 50.

The legislative purposes of Act 109 as expressed in 24 P.S. §5602 intimates that there exists upon the Commonwealth an obligation to prevent the closing of all non-public schools, because of the increased costs which would result upon the public school system. NAL submits that the appellants should be entitled to offer proof supporting the conclusion that the State is under no obligation, and has no authority, to insist upon the perpetuation of all Catholic and other sectarian schools. Evidence is available to explain the closing of a number of these schools. The Court should be aware of some of these reasons: (1) the lack of academic excellence; (2) lack of interest upon

the part of the parents; (3) the desire of many parents to have their children educated within the mainstream of American life; and (4) financial considerations.[8] NAL is convinced that evidence should be heard for the purpose of determining whether the state, in pursuit of its proximate desire to reduce educational costs, should provide assistance payments to religiously oriented schools.

NAL urges that it is a mistake to conclude that the primary effect of Act 109 is limited to secular instruction and that it benefits religious institutions only in an incidental manner. Even when viewed within the narrow limits of the legislative findings and the face of the statute itself, an immediate conflict results which appears to frustrate the basic purpose of the statute.

The majority below held, as did *Allen*, that the "States interest in education would be served sufficiently by reliance upon the secular teachings that accompany religious training in non-public schools. 310 F. Supp. at 46. The majority also expressed what we submit is an erroneous conclusion: "... [R]eligious schools pursue two goals, religious instruction and secular education," citing *Allen*, 392 U.S. at 245, 310 F. Supp. at 46.

The conclusions reached both in *Allen* and *Lemon* that religious schools pursue two goals, secular and religious, is directly contradictory to Catholic Church teachings. The goal of Christian education is expressly set out in the Declaration of Christian Education as follows: [9]

> A Christian education . . . has as its principal purpose this goal: that the baptized . . . become ever more aware of the gift of faith they have received, and that they learn in addition how to worship God the Father in spirit and trust . . . , and be conformed in their personal lives according to the new man created in justice and holiness of truth . . . ; also that they develop into perfect manhood, to the mature measure of the fullness of Christ . . . Moreover, that aware of their calling, they

[8] McCluskey, *Catholic Education Faces Its Future*, (1968) at 120.

[9] Paul VI, *Declaration on Christian Education*, St. Paul Edition, (1965) at 7.

> learn not only how to bear witness to the hope that is in them but also to help in the Christian formation of the world . . . Wherefore this sacred synod recalls to pastors of souls their most serious obligation to see to it that all the faithful, but especially the youth who are the hope of the Church, enjoy this Christian education.

The "two goal" end of Christian education as expressed in *Allen* and *Lemon* can be explained, at least in part, by the "meager record" (*Allen*) 392 U.S. at 248, as well as the "no record" in *Lemon*. This is why NAL feels so strongly regarding the need of an adequate record. Based upon our knowledge of Catholic Church teachings, the best that can be stated is, while the goal of Christian education can only be expressed as the formation of Christian beliefs and attitudes, the means to inculcate their attitudes must indeed include secular concepts. This is no less true in schools committed to forming Christians. The schools must use all of their functions to develop these attitudes.

Let us now set out some of the traditional concepts of Christian education, which, if established in an evidentiary manner, would tend to sustain the conclusion of but a single goal.

That the basic purpose and proximate end of parochial schools is religious orientation cannot be denied. The laws of the Church support that view and claim to have greater dominance than civil law. If the law of the Church is considered preeminent to civil law, and such ecclesiastical law contravenes the expressed concepts of the civil law, can we deny that the purpose and primary effect of Act 109 is, at the very least, subjectively frustrated in its relationship with Catholic parochial schools?

Modern day Catholic Church teachings on Christian education can be traced to the encyclical of Pope Pius XI, Christian Education of Youth, (Dec. 1, 1929). In this encyclical Pius XI treats of education in its broadest conceptual extent: both natural and supernatural, physical and spiritual, moral and intellectual, and as carried on by the family, the state, and the

church. The concept expressed by Pius XI is that man beginning with all natural talents and capacities gradually evolves to a higher, divine life (heaven). The model for this life, of course, is Christ. This concept represents the totality of Christian education, and the goal to be attained in the education of a Christian.

The manifestation of Church law as promulgated by Pius XI is summed up in several places in this renowned encyclical.[10]

> It must never be forgotten that the subject of Christian education is man whole and entire, soul united to body in unity of nature, with all his faculties natural and supernatural, such as right reason and revelation show him to be; man, therefore, fallen from his original estate, but redeemed by Christ and restored to the supernatural condition of adopted son of God. . . .[11]
>
> The proper and immediate end of Christian education is to cooperate with divine grace in forming the true and perfect Christian, that is, to form Christ himself in those regenerated by Baptism. . . .[12]
>
> . . . Christian education takes in the whole aggregate of human life, physical and spiritual, intellectual and moral, individual, domestic and social, not with a view of reducing it in any way, but in order to elevate, regulate and perfect it, in accordance with the example and teaching of Christ.
>
> Hence the true Christian, product of Christian education, is the supernatural man who thinks, judges and acts constantly and consistently in accordance with right reason illumined by the supernatural light of the example and teaching of Christ.[13]

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[10] Pius XI, Encyclical letter, *Christian Education of Youth*, (1929) English translation is from the National Catholic Welfare Conference edition (Wash. D.C., 1936), unless otherwise noted.

[11] Ibid., at 23.

[12] Ibid., at 35.

[13] Ibid., at 36.

Pius XI remains unequivocal in asserting the full authority of the Church to regulate every aspect of education. The preeminence of the Church in matters of education is expressed in the following passages from the encyclical:

> . . . (The Church) has the express mission and supreme authority given her by her divine founder: "All power is given to me in heaven and on earth. Going therefore teach ye all nations . . ." [14]
>
> The Church is independent of any sort of earthly power as well in the origin as in the exercise of her mission as educator . . . With regard to every other kind of human learning and instruction . . . the church has an independent right to make use of it, and above all to decide what may help or harm Christian education. . . .[15]
>
> . . . It is necessary that all of the teachings and the whole organization of the school, and its teachers, syllabus and textbooks in every branch, be regulated by the Christian spirit, under the direction and maternal supervision of the church; so that Religion may be in very truth the foundation and crown of the youth's entire training; and this in every grade of school, not only the elementary, but the intermediate and the higher institutions of learning as well.[16]

The transcending authority of the church over the state in matters of education is abundantly set out in the encyclical above. But we must move on and determine whether the traditional position of the Church has undergone serious revision. It appears certain that the promulgation of this encyclical outlining the preeminence of the Church in matters of education, and the adoption of a religiously and morally permeated curriculum, has lost none of its fervor.

As recently as 1960, Pope John XXIII in a letter to the International Office of Catholic Education, Utrecht, Netherlands wrote: "Catholic educators will know how to adopt to new

[14] Ibid., at 14

[15] Ibid., at 8.

[16] Ibid., at 30.

situations the ever new principles of Pius XI admirable Encyclical on the Church's teaching authority. This capital document has lost none of its truth." [17]

The Declaration on Christian Education [18] promulgated by the bishops during Vatican II is awakening Catholic educational philosophies. Nevertheless, a careful reading of this instruction reflects a continuing endorsement of the concepts expressed in the encyclical by Piux XI. It cannot be denied that the Church has an urgent responsibility for the totality of the Christian life. We cannot disparage this responsibility; nor can we accept the concept that Catholic education runs along parallel traces of secular and religious orientation. The recent declaration refutes the concept of a separatist approach to Catholic education. This intent is expressed in the following relevant passages:

> To fulfill the mandate she has received from her divine founder . . . the church must be concerned with the whole of man's life, even the secular part of it insofar as it has a bearing on his heavenly calling.[19]
>
> Therefore, children and young people must be helped, with the aid of the latest advances in psychology and the arts and science of teaching, to develop harmoniously their physical, moral, and intellectual endowments. . . .[20]
>
> Parents who have the primary responsibility and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools, consequently, the government . . . must see to it . . . that *public assistance is given*. . . .[21] (Emphasis ours)
>
> The church reminds parents of the duty that is theirs to arrange and even demand that their children be able to

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[17] Conway, *Principles of Education*, at 2n (1960) citing The Register, National Edition, January 10, 1960.

[18] Paul VI, *Declaration on Christian Education*, St. Paul Edition, (1965).

[19] Ibid., at 5, 6.

[20] Ibid., at 6, sec. 1.

[21] Ibid., at 10, sec. 6.

> enjoy these aids and advance in their Christian formation to a degree that is abreast of their development in secular subjects. Therefore the church *esteems highly those civil authorities* and societies which, bearing in mind the pluralism of contemporary society and respecting religious freedom, *assist families so that the education of their children* can be imparted in all schools according to the individual moral and religious principles of the families.[22] (Emphasis ours)

The concept ever present in church educational discipline is that the Christian spirit must permeate the entire curriculum. The concept of permeation as an integrated Catholic unit is almost universally endorsed by Catholic leaders and educators. The importance of an integrated Catholic educational system is pointed out by Dr. Roy J. Deferrari of the Catholic University of America in his work entitled "A Complete System of Catholic Education Is Necessary." In this book (bearing the Imprimatur of Cardinal Patrick A. O'Boyle, D.D., Archbishop of Washington), the author expresses the following:

> In the implementation of Catholic education, the all-important problem is obtaining enough properly trained teachers. This involves much more than appears evident at first sight. The teachers must be able to teach their subjects in a manner that will place them in their proper perspective with all the other subjects of the curriculum. They must be able to integrate as they teach.[23]
>
> Most of us would be willing to assert that . . . , integration with life is necessary for good teaching in any field. But it is at this point that the secular and the Catholic educator come to the parting of the ways.[24]
>
> He [the teacher] must seek integration through theology, under whatever name theology may raise her head in a Catholic school or college. In other words, the Catholic teacher must seek integration with the life of the next

[22] Ibid., at 11, sec. 7.

[23] Deferrari, *A Complete System of Catholic Education Is Necessary*, (1964) at 19.

[24] Ibid., at 20.

> world as well as with life in the present, since the two are integrally related, and are essentially one.[25]
>
> To implement successfully the Catholic concept of integration more is needed than the mere introduction . . . of courses in theology and religion, philosophy and church history, . . . The ultimate objectives of these courses and the ultimate objectives of the total program must penetrate every teaching field of the school or college.[26]
>
> Some administrators . . . think nothing of hiring non-Catholics as teachers . . . How they can expect to carry on a program of integrated studies with such a policy as this is difficult to understand.[27]

Even the popular, late Archbishop of Boston expresses himself forcefully upon the permeation concept. In his book entitled "The Mission of the Teacher", Richard Cardinal Cushing expresses his concepts of a Catholic education system:

> We must prove to them [students] that they are indebted to the church . . . We must make it clear, not merely in our philosophy classes, but in all branches of learning, that permeating all our formal education . . ., there is a philosophy . . . which is unique and indispensable. . . .[28]

He continues

> The embodiment of the Catholic "manner" should be Jesus Christ, and His personality should dominate all our schools. If it does, then He will be the principle difference between our schools and all others. . . .[29]

Finally the late Cardinal relates in a paper entitled "Education—A Supernatural Work."

> We are in line with the best educational traditions when we make religion the integrating subject to which all

[25] Ibid., at 21.

[26] Ibid., at 23, 24.

[27] Ibid., at 30, 31.

[28] Cushing, *The Mission of the Teacher,* (1962) at 17.

[29] Ibid., at 25.

> other subjects are related. In its relationship to the school's curriculum, it should be the strongest, the pivotal department. See to it, therefore, my dear teachers, that you keep religion in the atmosphere of the school and in the teaching of every class.[30]

NAL submits that the underlying premise of *Allen* that non-public schools, even if religiously oriented, perform a secular purpose distinctly severed from religious teaching fails when placed against the overt concepts of Christian education. The permeation and integration philosophy cannot be ignored. It is fundamental to a sound Christian education. We respectfully urge the Court not to repeat the error in *Allen* and make a judgment without full consideration of available evidence.

The similarity between the statute in *Allen* and Act 109 apparently caused the lower court to conclude that discovery and testimony were unnecessary to a determination of the establishment issue. We are not convinced that intrinsic similarities exist. The New York statute does not expressly limit the definition of "textbooks" to secular subjects, New York Education Law § 701 (1967 Supp.). This conclusion was judicially determined by the Court of Appeals of New York. *Board of Education v. Allen*, 20 N.Y. 2d 109, 228 NE 2d 791, (1967).

But the Pennsylvania Act expressly, on its face, limits the implementation of this program to secular subjects. This term is defined in §5603 as follows:

> "(3) 'Secular subject' shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing *religious teachings*, or the *morals* or forms of worship of any sect." (Emphasis ours)

The relevant terms expressed in the statute are "religious teachings or the morals . . . of any sect." It appears manifestly certain that if ecclesiastical law *prohibits* the exclusion of the religious teaching or knowledge of proper morality in "secular subjects" and Act 109 *requires* the exclusion, the former law must give way in order for Act 109 to become effectual. The law

[30] Ibid., at 149.

of the Church on this matter is unchanged; therefore the purpose of Act 109 is subjectively frustrated. Some will argue that the relevant laws of the Church, while not expressly repealed, have gradually eroded and, in some instances, are virtually meaningless. It appears that such an argument is without foundation. This is evident from the following statement:

> The church is conservative in her legislation. Changes in the universal laws of the church are made solely by the Holy See, and only for serious reasons and after mature deliberations. . . . In the case of doubt whether the former law has been revoked, the repeal of the law is not to be presumed, . . .[31]

We have shown through the Declaration on Christian Education, supra, that the permeated curriculum is as relevant today in the area of religious teaching *and morals* as ever. No tenet of ecclesiastical law has, either in part or in toto, abrogated this rule. Unless appellees offer evidence to rebut the proximate effect of ecclesiastical law, the purpose and primary effect of Act 109 is frustrated and rendered ineffectual, *per se*.

Chief Circuit Judge Hastie in his dissenting opinion in *Lemon* expressed the concern that Act 109, . . . "much more than *Everson* and *Allen* invites religious groups and organizations to act politically and involved the state intrusively in the affairs of religious institutions." *Lemon v. Kurtzman*, 310 F. Supp. at 51. Up to this point, the community divisiveness and antagonism over matters of religion, as expressed by Judge Hastie, have not been of a significant import. However, the introduction of financial aid to parochial school legislation in a large number of states has created what some consider permanent wounds. For example, legislation, virtually identical to Act 109, was considered by the Illinois legislature during 1970 and an NAL representative was privileged to testify at the request of the legislature. Feelings ran high during this session over the issue of state aid. Consider the comments of Martin J. Lowery, Chicago Diocese school board chair-

[31] Woywood & Smith, *A Practical Commentary on the Code of Canon Law*, at 14, 15, New and Revised edition (1952) citing Canon 23.

man, as reported in the Chicago Tribune on May 17, 1970. "If the State Senate does not approve state-aid before the closing of this session, this board will initiate plans for the curtailment of the Catholic school program in every elementary school." Dr. Lowery is also quoted, in the May 17 edition of the Chicago Sun-Times, in pursuit of this threat to close Catholic schools if aid was not provided, as follows: "Sure this is a political move, and we expect a political response."

Consider please, the comments of Illinois State Senator Harris W. Fawell as he discusses the rising tensions which occurred during the legislative period of the Illinois bill; whose comments were reportedly precipitated by a dramatic and well-timed visit to the Illinois Legislature by Cardinal John Cody and an estimated 50 busloads of parochial school children. Fawell expressed: [32]

> If there was ever an outstanding example of the wisdom of our Founding Fathers' insistence on a constitutional separation of church and state, the pressure campaign being mounted to pass this legislation is it.
>
> When you combine the power of Chicago's mayor, a Democrat, the power of the governor of Illinois, a Republican, and the power of the Cardinal of the Chicago archdiocese, then reason is trampled, the state constitution is purposely blatantly subverted and most of the press and the General Assembly is stampeded.

Charles Nicodemus, Chicago Daily News columnist, in attesting to the pressure added,

> "Whether he's [Fawell] right or wrong . . . rarely, if ever, in Illinois history has the Legislature been subjected to a higher pressure lobby." [33]

Evidence available since the enactment of Act 109 clearly points out the dangers of governmental intrusion into the realm of church related activities. One of the most important elements to be considered by the Court is a determination, based upon

[32] Chicago Daily News, (5-23-70) Column by Charles Nicodemus.
[33] Ibid.

full disclosure, whether this act or similar proposals will give rise to "divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude." *Abington Township v. Schempp,* (1963) 374 U.S. 203, 307.

The community divisiveness created by the introduction of state-aid bills is to be abhorred. While the initial aim of church authorities apparently is to obtain limited aid while establishing the constitutionality of such aid; nevertheless, evidence is abundantly available to establish that the church will be satisfied with nothing less than parity.

During the recent elections, tax support for non-public schools was directly voted upon in two states, Michigan and Nebraska. In Michigan, a constitutional amendment prohibiting such support carried. In Nebraska, an amendment modifying a constitutional ban on such support was defeated. Thus the majorities in both states upheld the principle, written into the constitution of many states, including Illinois, that tax money should not be appropriated to the support of private schools.

We can only conclude here, upon the basis of available evidence and personal experience, that evidentiary matter would sustain the premise that similar legislation, "[I]nvites religious groups and organizations to act politically and involves the state intrusively in the affairs of religious institutions." *Lemon v. Kurtzman* (310 F. Supp. at 51)

NAL respectfully urges that the record before the court is meager and insufficient to term Act 109 constitutional. The act on its face and in its primary effect clearly conflicts with Catholic church law. Moreover, it appears certain that in this instant statute, at least as to primary effect, the Commonwealth has transcended the allowable position of neutrality. While it is not precisely determined whether the principle of neutrality runs to establishment or free exercise, our readings cause us to admit its relevancy to both. *Walz v. Tax Commission of City of New York,* 397 U.S. 664 (1970). It is our conclusion that the divisive effect of state aid legislative efforts and enactments is detrimental to neutrality concepts expressed by this Court. NAL respectfully submits that no decision upon this crucial issue should be made without an adequate record. The case

should properly be remanded to the District Court for an evidentiary hearing on the merits of this case.

ARGUMENT II

PENNSYLVANIA ACT 109 ABRIDGES THE RIGHT TO FREE EXERCISE OF RELIGION SECURED UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT THROUGH THE FOURTEENTH AMENDMENT.

The majority in *Lemon* found that the purpose of Act 109 was, as expressed in the statute, "to promote the welfare of the people of the Commonwealth of Pennsylvania" and "to promote the secular education of children of the Commonwealth of Pennsylvania" attending non-public schools." 310 F. Supp. at 45. While our argument I (above) refutes this conclusion, we must understand the implications of these legislative findings in its relationship to the free exercise clause.

The National Association of Laymen, (NAL), while not a direct party to the litigation, nevertheless, within the framework of an Amicus, is compelled to bring to the attention of the Court the crucial importance of this issue upon the religious beliefs and practices of members of this association as well as those who share its beliefs and ideologies. In the position of Amicus, NAL will establish "the coercive effect of the enactment as it operates against them [us] in the practice of their [our] religion" *Abington School District v. Schempp*, 374 U.S. 203, at 223 (1963).

The National Association of Laymen was established in 1967 and it origin was founded upon precepts having their genesis in Vatican II. This association is composed of thousands of Catholic men and women who have joined together in a mutuality of beliefs. Moreover, the basic beliefs of its members are based solidly upon the doctrine of Catholic church renewal, leading toward a mature Catholic, Christian religion. The basic ideologies of this association are shared by many thousands of American lay Catholics. The intrusion of the Commonwealth of Pennsylvania into Catholic religious affairs has created a

sense of anxiety and apprehension among virtually the entire membership of this association, many of whom are citizens and residents of Pennsylvania, as well as among other Catholics who share and espouse the beliefs we witness.

When Pope John XXIII summoned the bishops to Rome at the commencement of the Vatican Council II in the early 1960's, many American Catholics viewed this call as an encouraging sign that renewal in the Catholic Church had begun. The Council was looked upon as an opportunity for the laity to assert their rightful place in the church. A significant number of renewal minded Catholics were yearning for something from the Church which would enrich their lives and give them a vision and faith by which they can live and which they can draw on in the task of raising their families.

In setting out the mission and purpose of renewal the noted Catholic author Eugene C. Kennedy wrote:

> As the people of God we have a covenant with each other to pursue the same goals and to share our faith and love with all mankind. It is such understanding of our corporate mission that must motivate us to renew the institutional forms of the church. The question centers on institutional integrity. Do the institutions of the church contribute to its carrying out of service as effectively as possible? Those which do not must be repatterned so that they may become a true instrumentation of service.[34]

NAL members and ideological supporters are members of the Catholic Church. Many are products of Catholic education throughout. While faithful members of the Church and vitally concerned with its welfare, we are nevertheless imbued with the spirit of renewal permeated since Vatican II. The basic ideologies of NAL can be found in this summary of the preamble to its constitution:

> NAL is a group of Christian believers who are concerned to create within the Church a system of religion (i.e., beliefs, morality, religious practices, education) that is

[34] Kennedy, *The People Are the Church* (1969) at 12.

> not fatalistic and magical (as it is today) so that the basic trust of Judaism and Christianity is reinjected back into our church and the religious life of man. A religious life that lets man see himself responsible for himself and his world; entering into religious activities that express the intrinsic constant presence of God and man's awareness of this God. This involves a dramatic departure from a religion being passive, dependent, and childish to being active, independent, and free.

Our efforts at renewal are dedicated to a new religion which must have beliefs, morality, customs and behavior that encourages man to think for himself (not done by clergy), to decide for himself (not just being obedient), to create worship for himself (not just to follow canned rituals), to search continually for truth, to be open and respectful of a person's conscience (not to socially coerce a set conscience); to see Christ as the center of their lives, to allow men to gather with others of similar faith to worship and to pursue the above purposes.

The Catholic education system is the only manner in which the beliefs of NAL and its ideological supporters may be properly inculcated and our efforts at Church renewal accomplished. But NAL is convinced that the current overriding emphasis upon the parochial parish school is hindering the implementation of our beliefs. Our commitment to the mission of the church can be summed up in the words of Rev. Kennedy:

> The demands of the age are on those people who are charged with leading it to the freedom of the sons of God, not to bringing its people back into submission. It is their problem to see that the moral educational practice of the church is appropriately informed and mature.[35]

The traditional concepts of Catholic education has centered almost exclusively upon the parochial school system. The concept was, and remains, essentially child-centered. Although it reaches only a portion of the Catholic school and college

[35] Ibid., at 61

population, the system involves a large proportion of the church's available manpower, resources, and zeal.

> Historically, the bishop and clergy have taken the lead in maintaining parochial and diocesan schools . . . according to Canon law the bishop alone has the authority to establish parochial or diocesan schools . . . The totally subordinate relationship of the laymen in religious affairs, as well as the central position of the bishop in civil and Canon laws, have unfortunately resulted in an underemphasis on the role of the layman and laywoman —parents—in school matters.[36]

NAL firmly believes that the mission of the church can only be satisfied by providing each member of this church, adult and child alike, with the means to obtain total religious formation. The mission of the church is not limited to the child in the parish school. This mission extends to the Catholic child in the public school, the young adults both on off college campuses, and the adult Catholic, including the aged. Our priorities are misdirected if we insist upon providing a *general* education for only those children in Catholic schools if this concept prohibits or makes manifestly more difficult *religious* education to the remainder. We, in NAL, are committed to the concept that there must be a more complete vision of Catholic education.

In a recent publication discussing the changing patterns of Catholic education, the authors pointed out, "the shameful record of the American Catholic Church in meeting the religious educational needs of children who are not attending Catholic schools." Citing several studies to support this conclusion, the authors pointed out: [37]

> A recent . . . study by the National Office of the Confraternity of Christian Doctrine [CCD] discovered that parish CCD units are largely ineffective because they are crippled by . . . lack of direction and support on the part of the pastor and lack of financial support.

[36] McCluskey, *Catholic Education Faces Its Future*, (1968), at 114.

[37] Reedy-Andrews, *The Perplexed Catholic* (1967) at 67.

> In 1964, a national survey of 40% of U.S. dioceses showed that only five percent of funds available for religious education was used for education of students not attending Catholic schools, which is at least 50 percent of Catholic youth.

It is the corporate judgment of NAL that the present *system* of Catholic education, with the overriding emphasis upon parochial schools, is a dismal failure. If the parochial school absorbs the largest part of parish revenue, in some instances taking as much as 75%,[38] the religious formation of others is grossly neglected. "Can we afford, when the need for the religious formation of the whole Catholic people is so great, to provide a general education for all or even a part of our young people." [39]

Moreover, it is our further belief as Roman Catholics that the Church has an obligation to help all children get a superior education—not simply Catholics or those who attend church schools. Roman Catholic educator, James O'Donahue, director of the education department of the U.S. Catholic Conference proposed . . . "that many of the 13,000 parochial schools close so the Catholic church can aid Negro slum youngsters of all faiths," and suggested three priorities: [40]

1. Devotion of the necessary portion of resources to the education needs of the urban ghetto;

2. religious education [for all Catholics];

3. that area which now occupies the first place—operation of elementary and secondary schools."

There is a great residium of ill will generating among progressive Catholics and it arises for this reason: If the government begins to finance general education in parochial schools, their existence will be perpetuated, and efforts at church renewal frustrated. If this occurs, the school system will continue to dominate the life of the church and absorb the energies of

[38] Supra, Note 36 at 108.

[39] Ryan, M. *Are Parochial Schools the Answer* (1964) at 137, 138.

[40] Swomley, "Ecumenism and the School Aid Issue" *The Christian Century*, June 4, 1969.

priests and sisters who should be out helping the poor and fighting for social change, or providing for the religious education of all Catholics.

The basic tenets of NAL, and of many other Catholics, on the subject of perpetuating the existing public school system can be summed up as follows:

1. Before any perpetuation or expansion of the Catholic school system is considered, we must carefully evaluate our basic philosophy for maintaining a separate school system in accordance with the determinations of Vatican II.

2. The church must evaluate the need for its religious educational program. Once that has been determined, priorities in serving those needs must be established. The entire resources of the church must then be committed to the attainment of these established goals. Only when the religious formation of all is attained, can we even consider perpetuating a general educational program for the few.

For purpose of this free exercise argument only, we will assume the validity of the public welfare purpose of the "Nonpublic Elementary and Secondary Education Act" (P.L. 109). The effect of providing funds for the secular education of Pennsylvania school children attending Catholic schools is an immediate abridgment of the right of individual Catholics to the free exercise of their religion.

If the immediate concern of the state is to aid the public welfare by financing the secular education of Catholic school children, the consequence of this action is governmental assistance in perpetuating the existence of these schools. The indirect, but none the less important, effect is to discriminate against a considerable number of Catholics who believe, with the utmost sincerity, in the renewal of the Catholic religion. These people are genuinely concerned that unless church renewal is accomplished, the church will no longer be a viable force in the Christian world, particularly among the young. "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Sherbert v. Verner*, 374 U.S. 398, at 402 (1963).

The members of NAL and our ideological brothers in the Catholic church can be generally categorized as progressive minded Catholics. An essential ingredient of renewal, and that shared by NAL people is, as the people of God we have a covenant with each other to share our faith and love with all mankind. Our beliefs, our tenets, are intrinsically directed toward renewal and a mature understanding of religion, and not a child-centered one.

The financial aid given to parochial schools under Act 109 is injurious to our efforts to pursue renewal of the Catholic church. The heart of individual liberty is freedom from direct governmental coercion in the realm of ideas, beliefs, and opinions. *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943).

The real issue in this free exercise claim is that the public welfare statute, designed to promote the secular education of non-public school children, meets head on with a major effort by a large number of Catholics to strive for the renewal of their church. Opposition to church renewal is sufficiently difficult within the confines of the church itself, without the added aggravation of governmental intervention. The intrusion of government has given added, substantial incentive to the perpetuation of the existing Catholic school system. Our concept of renewal involves a restructuring of our entire educational system, with the emphasis upon religious education for all Catholics before a general education can be given to some.

The first amendment to the constitution provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The first amendment's free exercise clause has been made applicable to the states through the fourteenth amendment. *Cantwell v. State of Connecticut,* 310 U.S. 296 (1940). The free exercise clause safeguards the free exercise of the chosen form of religion. Thus the prohibition against abridgment involves two concepts: Freedom to believe and freedom to act. The first is absolute but the second imposes relative considerations. *Cantwell v. State* of *Connecticut,* supra. Given the absolute right of the state to enact legislation for the welfare of the general public, the de-

termination must then be made, when a religious freedom clause is asserted, whether the interest of the state is in conflict with the overriding interest of free exercise protection.

For example, in *Braunfeld v. Brown*, 366 U.S. 599 (1961), the public interest involved the provision for one uniform day of rest. The indirect result of the statute was a prohibition of Sunday sales of certain goods. This public interest was weighed against the religious practices of those who did not observe a Sabbath simultaneously with that of a majority of the community. The interest of the public was upheld principally upon the basis that the interference did not abridge a religious practice; but did render its practice somewhat more expensive. But in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the public interest in determining and ensuring the integrity and veracity of Notaries Public was held insufficient to justify the substantial abridgment of the religious freedom of applicants from a required oath of belief in God.

And in *Sherbert v. Verner*, 374 U.S. 398 (1963), we find the public interest in the administration of the State's unemployment benefit program was not sufficient to justify substantial infringement of the claimant's constitutional right to free exercise of religion. The Court in *Sherbert* held that the South Carolina law which denied unemployment compensation to a Seventh Day Adventist who, because of her religious beliefs, had declined to work on Saturday was a law which prohibited the free exercise of religion.

The presumable effect of Act 109 upon the religious freedom of renewal minded Catholics is particularly analogous to the doctrines of *Sherbert* and *Torcaso*. If Act 109 is to withstand the constitutional challenge of free exercise abridgment, it must be either because the act works no infringement upon the free exercise rights of Catholics (the predominant recipients of aid), or because any incidental burden on free exercise may be justified by a "compelling state interest. . . ." *Sherbert v. Verner*, supra, citing also *NAACP v. Button*, 371 U.S. 415 (1963).

NAL submits that it is imperative that the Court be informed regarding the motivation of Catholics who are striving, as well as sacrificing in a very real sense, for the renewal of our

religion. The underlying concept of the renewal movement is an absolute, irrevocable commitment to Christ and Christian principles. Our present generation is imbued with human concern and the church appears unable to respond. Renewal of this religion can only be accomplished through a Catholic educational system which is capable of reaching all Catholics and not just the few who are able to obtain the benefits of parochial school education.

Authorities and expert opinions cited in this argument attest to the powerful renewal forces operating in the Catholic church as a result of Vatican II. NAL is overwhelmingly convinced that the effect of Act 109 is to obstruct this renewal effort, and thereby infringes upon the religious freedom of renewal minded Catholics.

But even if it is established that Act 109 infringes upon the religious freedom of a large number of renewal minded Catholics, the next issue for consideration is whether some compelling state interest justified the substantial infringement upon free exercise rights. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area" *Sherbert v. Verner*, supra, "[O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas v. Collins*, 323 U.S. 516 (1945).

Efforts by conscientious, renewal minded Christians to reform their church cannot be categorized (perhaps other than in the minds of the hierarchy) as a grave abuse, endangering paramount interest. The effect of financial aid to Catholic schools is to offer assistance to those Catholics who appear unwilling to commit the church to the establishment of priorities in Christian education. The Supreme Court has firmly decided that government must be neutral in matters of religious theory, doctrine, and practice. "It may not be hostile to any religion . . .; and it may not aid, foster, or promote one religion or religious theory over another or even against the militant opposite." *Epperson v. Arkansas*, 393 U.S. at 104 (1968).

In weighing the value judgment required under a free exercise claim, the exclusion is inescapable that the effect of Act

109 is to interfere with the religious beliefs and practices of progressive Catholics. The Commonwealth involvement has tipped the balance toward governmental restraint on religious practice. *Walz v. Tax Commission of City of New York*, 367 U.S. 488 (1970).

The issue raised in these arguments is not the issue of priority of educational goals as seen from the eyes of progressive or traditional minded Catholics. Certainly the issues of priorities and allocation of resources must be determined among the membership, including the leaders of the Catholic church. The court should not in any way consider the matter of intra-church ideological concepts. But the issue, the overriding issue is, that the state has absolutely no constitutional authority to intrude into this church dispute by offering financial assistance to one of the combatant parties. The Commonwealth of Pennsylvania, in enacting Act 109, has done precisely that, and this conclusion may be easily established in an evidentiary hearing. We must conclude that no compelling interest of the Commonwealth can work to infringe the religious freedom of renewal minded Catholics. *Sherbert v. Verner*, 374 U.S. at 407 (1963).

Moreover, NAL submits that if the Court finds a compelling state interest in promoting the secular interest of children attending non-public schools, and such interest does work an abridgment of free exercise, the statute must be declared invalid unless the State can establish that no other means are available whereby the State may accomplish its purpose. *Braunfeld v. Brown*, 366 U.S. at 607 (1961), and *Sherbert v. Verner*, 374 U.S. at 407.

NAL respectfully urges for the Court's consideration that there are methods of promoting the secular interest of children in non-public schools by means other than direct financial aid. Certainly the use of public funds to pay bus fares of parochial school children has only limited, if any, free exercise abridgment. *Everson v. Board of Education*, 330 U.S. 1 (1947). Lending of textbooks to students in parochial schools, *Board of Education v. Allen*, supra, does not work a substantial abridgment upon free exercise of religion. Dual enrollment programs whereby parochial school students would spend part of their

day as public school students should not be considered as a substantial abridgment of religious freedom nor a substantial interference with efforts at church renewal. These are alternatives currently pursued but have not as yet attained wide acceptance. We urge the court to consider these as possible, realistic alternatives open to the Commonwealth in determining whether the State's public welfare purpose is compelling.

The issue of compelling need raises one last question which should be brought to the attention of the Court, and it is indirectly related to the possible alternatives listed above. That question is: Is there a compelling financial need requiring the Commonwealth of Pennsylvania to promote the secular education of children attending Catholic parochial schools?

One of the major factors influencing many legislators to acquiesce in proposals of aid to parochial schools is the fear that Catholic schools will be forced to close. The assumption that parochial schools will close is not necessarily sound. For example, the noted educational sociologists Andrew Greeley and Peter Rossi declare in their 1966 study "The Education of Catholic Americans" (Aldine) that "there is . . . nothing . . . to suggest that the Catholic educational system will not continue into the forseeable future." [41] Commenting upon the future of Catholic, parochial schools, they add: "Most Catholic education correlates with social class and Catholics are improving socially and economically. There will in all likelihood be an increased demand for desks in Catholic schools." [42]

It is no secret that the Catholic hierarchy refuses to make known the facts about its general finances to Catholic laity or even to the various state legislatures. NAL has, from its very beginning, requested, urged, and demanded that bishops "make an account of their stewardship." Nevertheless, few, if any, American dioceses provide full financial disclosure to the members of the Catholic church. The National Association of Laymen declared in January of 1969 that laymen have a "responsibility to divert support to other Christian works when the church's financial status remains veiled in secrecy." The maga-

[41] Supra, note 40 commenting upon Greeley-Rossi study.

[42] Ibid.

zine, Christian Century, reported that NAL, in 1969, called for a moratorium on Catholic school construction until the "existing crisis in all areas of Catholic education is studied by an independent research agency." [43]

In this article by Dr. John M. Swomley, Jr., the Christian Century continued in their discussion of Catholic church finances:[44]

> And the Jesuit weekly America recently stated editorially: "Without formal budgets, adequate accounting and cost analysis and annual financial reports, we do not really know what Catholic education is costing the Catholic community. It is true that we must know and that we organize our schools so that we shall know."
>
> As of now, however, the hierarchy has been deaf to such protests. And here is one of the clearest reasons for opposing public aid to parochial schools. It would —to say the least—be unwise for our government to make appropriations for any organization whose finances are kept secret from both the public and its own members.

The plea for full financial disclosure is by no means limited to Catholic laity. At least one American bishop has spoken out for such disclosure. Bishop Joseph L. Bernadin, general secretary of the United States Catholic Conference stated that complete accounting of Roman Catholic school finances would show the public the serious money crisis existing in parochial schools. The bishop is quoted in the National Catholic Reporter as follows: [45]

> Perhaps in the mechanics of the thing it is impossible to reveal school finances without publishing total church financial resources" . . . If we don't let the public know the seriousness of the school situation, how can we expect the public to help? . . . Whatever is done about Catholic education must be done in terms of the total teaching mission of the church which includes those

[43] Supra, note 40.

[44] Ibid.

[45] National Catholic Reporter, April 14, 1969.

> children in and out of Catholic schools—elementary, secondary, college, and adult education. . . . According to this principle we would start with the educational needs of all and then apportion our resources accordingly. If the resources were not sufficient, we would have to establish priorities. . . .

Certainly the argument is heard that the financial condition of churches is not within the realm of governmental concern. Nevertheless, legislative history of current state aid attempts set out allegations and unsubstantiated claims regarding the poor financial condition of parochial schools. It appears certain that if such unsupported allegations are made, and financial aid considered upon the validity of these allegations, then the State has a firm obligation to determine the accuracy of such claims.

We submit for the Court's consideration that the issue of compelling need of this "public welfare" legislation is open to inquiry whether such a need really exists, in the absence of an affirmative showing of financial need by Church authorities. Further, the Commonwealth should be required to establish, to the satisfaction of the trier of facts, that an alternative form of assistance is not available, i.e., direct financial assistance from the Church itself.

CONCLUSION

The National Association of Laymen respectfully submits that no decision should be made in this case without full consideration of all available evidence, and urges the court to remand the case to the District Court below for further action consistent with this recommendation.

Respectfully Submitted,

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